

# FROM GLADIATORS TO PROBLEM-SOLVERS: CONNECTING CONVERSATIONS ABOUT WOMEN, THE ACADEMY, AND THE LEGAL PROFESSION

SUSAN P. STURM<sup>\*</sup>

## I. INTRODUCTION

Dissatisfaction permeates the public and professional discourse about lawyers and legal education. Diverse communities within and outside the profession are engaged in multiple conversations critiquing legal education and the profession itself. These conversations, though linked in subject matter and orientation, often proceed on separate tracks.

One set of conversations explicitly focuses on women and people of color, centering on their marginalization and underrepresentation in positions of power.<sup>1</sup> Those concerned about race and gender exclusion often participate in

---

Copyright © 1997 by Susan P. Sturm.

<sup>\*</sup> Professor of Law, University of Pennsylvania Law School.

1. See A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 14, 21 (1996) [hereinafter *ELUSIVE EQUALITY*] (finding that the rising number of women in legal education has not resulted in the elimination of pervasive gender bias within the academy, and recommending a series of steps to move more swiftly toward removing that barrier to women's success in law school); see also A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 5 (1995) [hereinafter *BASIC FACTS*] (stating that 17% of all law school professors are women, and 67% of lecturers or instructors are women); REPORT OF THE MULTICULTURAL WOMEN ATTORNEYS NETWORK, *THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER* 1-2 (1994) [hereinafter *BURDENS OF BOTH*] (discussing the invisibility of multicultural female attorneys within the legal profession); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 19-20 & n. 63 (1994) (stating that female law students speak less often than male students). See generally A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR* (1995) [hereinafter *UNFINISHED BUSINESS*] (describing women's progress in the legal profession as well as ongoing concerns about exclusion, hostility, and underrepresentation); LINDA F. WIGHTMAN, LSAC RESEARCH REPORT SERIES, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN* (1996) (presenting empirical quantitative data garnered from a national, longitudinal study of first year law students); Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291 (1995) (documenting and attempting to explain continuing stereotyping and underinclusion of women in positions of power within New York City law firms); Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 *CHI.-KENT L. REV.* 331 (1992) (lamenting small numbers of minorities on law school faculties and the resulting overload, both formal and informal, placed on the few); Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39 (1994) (discussing opportunities for women in the legal profession); David Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 *STAN. L. REV.* 1981 (1993) (critiquing a value neutral focus of legal education and urging an obligation theory focus).

separate communities of discourse.<sup>2</sup> Indeed, the symposium that spawned this article framed the inquiry about higher education in terms of gender.<sup>3</sup> This exclusive focus on gender created a recurring tension in writing this article that stems from the incompleteness of gender as a critical framework.<sup>4</sup> This tension, resolved unsatisfactorily by focusing on gender but continually noting the relevance of the analysis to race and class, exemplifies the failure of existing inquiry to bridge the concerns of women and people of color about law, legal education, and the legal profession.

A second conversation questions the appropriateness of the values and goals of the prevailing legal educational mission.<sup>5</sup> Some critics charge that traditional legal education trains lawyers to focus on the short-term, purely economic interests of those in power at the expense of thorough analysis and clients' long term interests, and without regard to the impact on third parties and the community.<sup>6</sup> Other critics focus on legal education's preoccupation with rigorous, analytical reasoning and its failure to prepare future lawyers to meet the multifaceted, transactional nature of legal practice.<sup>7</sup>

2. The task forces exploring inequality in the courts generally are bifurcated into gender task forces and racial and ethnic task forces. See generally Melisa D. Evangelos, *Bias in the Washington Courts: A Call for Reform*, 16 PUGET SOUND L. REV. 741 (1993) (discussing bias based on race and gender in the judicial system and task forces that have been created to address the problems); Ann J. Gellis, *Great Expectations: Women in the Legal Profession*, A COMMENTARY ON STATE STUDIES, 66 IND. L.J. 941 (1991) (discussing the results of several studies commissioned by state bar associations to look at women in the legal profession); Ninth Circuit Task Force on Gender Bias, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 STAN. L. REV. 2153 (1993) [hereinafter *Executive Summary*]; Judith Resnick, *From Classes to Courts*, 45 STAN. L. REV. 2195 (1993) (discussing her experiences both as a law professor and as a member of the Ninth Circuit Task Force on Gender Bias). Many of the articles examining the status of underrepresented groups in the profession focus on either race and ethnicity or gender. See, e.g., sources cited *supra* note 1.

3. This differentiation occurs in part because of the complex and distinctive dynamics and challenges of gender and racial marginalization, and in part because of the different (though overlapping) constituencies for racial and gender issues.

4. See discussion *infra* notes 15-18 and accompanying text.

5. See, e.g., A.B.A., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 123-221 (1992) [hereinafter *MACCRATE REPORT*] (discussing the skills and values needed in the legal profession and how they are developed); RICHARD ABEL, *AMERICAN LAWYERS* 150-57 (1989); ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 1-4 (1981); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 905-11 (1995) (discussing the flaws of the case method and the erosion of students' public interest commitments during law school). See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (describing how law schools, law firms, and the courts contribute to the lack of proper values and goals within the judicial system and the legal profession); Howard Lesnick, *Being a Teacher of Lawyers: Discerning the Theory of My Practice*, 43 HASTINGS L.J. 1095 (1992) (discussing how traditional teaching methods are failing to instill values in the legal profession).

6. See, e.g., Kimberlé Crenshaw, *Forward: Toward a Race Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3-10 (1989) (discussing the tendency of law school classes to treat social, political, and institutional factors as irrelevant, objective, or unproblematic and thereby suppressing political and moral engagement); Wilkins, *supra* note 1, at 2016 (describing the tendency of legal education to "encourage students to develop a radically skeptical attitude toward even the possibility of engaging in normative argument.").

7. See, e.g., Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 532 (1994) (criticizing the appellate case method for failing to provide adequate opportunity to

Yet another conversation critiques the prevailing model of legal professionalism perpetuated by the traditional law school curriculum.<sup>8</sup> These critiques are both instrumental, in their questioning whether the model of the legal profession embraced by law schools adequately prepares lawyers and the legal profession to deal effectively with the challenges of the twenty-first century workplace,<sup>9</sup> and normative, in their examining whether reigning models of legal professionalism are morally and ethically justifiable.<sup>10</sup>

Each of these three conversations includes as a leitmotif a critique of the dominant model and practices of lawyering, as reflected in both legal education and practice.<sup>11</sup> This "gladiator" model of legal education and lawyering celebrates analytical rigor, toughness, and quick thinking.<sup>12</sup> It defines successful performance as fighting to win: an argument, a conflict, or a case.<sup>13</sup> Even in more in-

---

learn the skills of the legal counselor); Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43 (1991) (writing that law students "have learned little about encountering people in situations of stress and fashioning solutions to their problems in ways that are responsive to the human as well as the legal dimensions of the problems."). See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). But see KRONMAN, *supra* note 5, at 113-14, 154-55, 158 (discussing the virtues of the case method because it "nourishes" and "promotes" deliberative wisdom and public spiritedness, as well as encouraging the "tendency to take a conservative view of law and politics.").

8. See, e.g., Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 S. CAL. REV. L. & WOMEN'S STUD., Fall 1994, at 53, 53-56 (discussing how professionalism is and is not taught in law schools); Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937, 1938 (1993) (stating that "the ways in which the civic education [is] delivered in law school inevitably aligns the interests of the law student with those of the profession.").

9. See generally Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 517 (1994) (discussing the past and future of teaching skills and values in the legal profession); Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994) (explaining changes in the way law will be practiced in the 21st century and stating that law schools need to adapt their teaching methods to these changes now); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345 (1994); Ronald W. Staudt, *Does the Grandmother Come With It?: Teaching and Practicing Law in the 21st Century*, 44 CASE W. RES. L. REV. 499 (1994) (discussing current teaching methods and the development of an electronic law school model).

10. See generally Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 509, 511 (1987) (discussing the need to teach more than the current value system or "ordinary religion" of legal education and make a commitment to "search for the good."); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 259, 273 (1990) (discussing the inadequacy of the partisan role of lawyers in fulfilling the public oriented mission of the profession that justifies the adversary system in the first place).

11. See David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYER'S ROLE AND LAWYERS' ETHICS 83, 89 (1983). The theory has been articulated in vivid terms:

Litigation is commonly referred to as a war, or more often as a battle. The other battle metaphors flow from this premise. For example, some refer to the roles that trial lawyers play in this war. They can be heroes, hired guns, gladiators, warriors, champions, generals, lone gunfighters, or the man on the firing line.

Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 232-33 (1995).

12. See KRONMAN, *supra* note 5, at 246.

13. See SOL LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 13-14 (1994) ("Today the prevailing view in the profession is that what matters in the lawyer's world is 'winning.'"); DAVID LUBAN, *LAWYERS AND JUSTICE* 7 (1988) (discussing Murray L.

formal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model.<sup>14</sup> The lawyer reasons back from the ultimate fight—in the courtroom, at the bargaining table, or in the administrative hearing—to develop strategies and legal responses that would best position the client to win should a crisis occur.

The conversations about underrepresented groups, legal education, and legal professionalism each question the adequacy of this one-size-fits-all, gladiator conception of lawyering and legal education.<sup>15</sup> Yet these discussions often proceed as separate conversations. The trends in one conversation may affect another, but the strategies and conceptualizations are distinct. The conversation about women's place in the profession attracts a different group of participants than the conversation about the legal profession's continued vitality, growth, and productivity.<sup>16</sup>

This article suggests that these conversations are related, indeed, interdependent. It builds from the critique of the gladiator model as a dominant, organizing framework of legal education and lawyers' roles to find a synergy between the goals of those seeking to include women<sup>17</sup> and those seeking to revitalize the profession to meet the demands of the twenty-first century. It explores the outlines of a problem-solving orientation to lawyering and legal education that has potential to address and create a dynamic between the concerns of women and the need to reclaim the soul of the legal profession.<sup>18</sup> A move from gladiator to problem-solver may brighten both the future of the legal profession and the future of women and other underrepresented groups in the legal profession.

## II. THE IMPORTANCE OF BRIDGING CONVERSATIONS

Linking the separate conversations about law and the legal profession is an essential step for each of these conversations. The call to explore synergies among distinct critiques has strategic, normative, and theoretical roots. On a strategic level, reforms framed narrowly around the concerns of particular marginalized groups do not alter the cultural and institutional baseline. As a result, narrowly tailored initiatives are reinterpreted to maintain and reinforce the

---

Schwartz's view that the standard conception of the lawyer's role when acting as an advocate includes the exhortation of the lawyer to work "within the bounds of professional behavior, [and] maximize the likelihood that the client will prevail.").

14. See Gordon, *supra* note 10, at 281-82 (describing legal departments adopting a narrow, partisan, and defensive view of the lawyer's role).

15. See *supra* notes 1, 5, 8 and accompanying text.

16. My experience participating in conferences is illustrative of the separate audiences. Audiences organized around the theme of women in the profession or gender have consisted predominantly of women. In contrast, when I have presented a paper framed by the theme of rethinking law, the audience has been predominantly male. Similarly, the composition of the audience varies depending on whether the focus of inquiry is on race or gender.

17. This approach of using the critique from the margins to rethink the whole also applies to the experiences and perspectives of many other group members which make visible ways in which the status quo is unfair and dysfunctional. For a more in depth discussion of the role that class and race can play as signals of institutional dysfunction, see generally Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

18. See *infra* notes 93-104 and accompanying text.

status quo. For example, in a law school that emphasizes tough, hierarchical interrogation of students as the dominant approach and the icon of success in first year teaching, any initiative that departs from that norm faces the likely prospect of marginalization and delegitimation.<sup>19</sup> Similarly, law school admission policies that treat race and gender as add-ons to existing criteria implicitly legitimize a system of selection that is fundamentally and deeply flawed for those who it includes as well as for those left out.<sup>20</sup> Because traditional affirmative action programs leave this selection process intact, those perceived as departing from that system face the prospect of marginalization. The same culture of dominance that necessitates affirmative action undermines the capacity of rhetorical strategies to justify race or gender based considerations in selection. Notwithstanding their bias and inadequacy, existing merit selection standards remain unexamined and unchanged.<sup>21</sup>

Standards and practices cannot effectively “be challenged solely from the perspective of the margins because the challenges themselves then become marginalized.”<sup>22</sup> Rectifying the exclusion or marginalization of particular groups or values requires analyzing the overall institutional framework of legal education and legal practice. This means examining patterns of exclusion and dysfunction that cut across different groups and issues. By finding areas of common concern and broadening the constituencies pushing for change, critics can expose problems and create pressure for institutional reevaluation.

On a normative level, the desire to bring these conversations together stems from the view that legal education and the legal profession cannot claim legitimate moral stature if they systematically exclude, marginalize, or undervalue women and people of color.<sup>23</sup> The legal profession has carved out a crucial gate-keeping role in providing access to and influence over public decision making. Legal workplaces have become important sites for the exercise of basic attributes of citizenship, including participating in deliberations about issues of public importance and receiving financial and social benefits. In an era when the benefits of citizenship depend on access to education and employment, the legitimacy of institutions that broker access to these benefits depends on providing access in a fair, inclusive manner. Screens or barriers to participation in these institutions

---

19. Cf. Crenshaw, *supra* note 6, at 1 (describing how efforts to raise the awareness of race and class prompt informal sanction by students or professors).

20. See Sturm & Guinier, *supra* note 17, at 954-56 (1996); see also Okechukwu Oko, *Laboring in the Vineyard of Equality: Promoting Diversity in Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 202-03 (1996) (criticizing existing selection criteria for their failure to take into account the impact of environmental factors, especially race, on academic performance).

21. See Oko, *supra* note 20, at 203-04 & n.74 (citing Albert Turnbull et al., *Law School Admissions: A Descriptive Study*, in LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME II, 1970-74, at 265 (1976) (“after reviewing the results of fifty-seven different validity studies [they] concluded, . . . that, for the great majority of their students, grades and Law School Admission Test (LSAT) scores are not very closely related to actual first year performance.”)); Sturm & Guinier, *supra* note 17, at 971-72, 1003-04.

22. Sturm & Guinier, *supra* note 17, at 1001; see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 96-97 (1990) (noting the importance of reshaping institutions to achieve meaningful equality and fairness); Judith Resnick, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525, 1534-35 (1993).

23. See Sturm & Guinier, *supra* note 17, at 1031.

should be drawn in the least exclusionary manner consistent with the institution's mission. Law schools and the legal profession bear a special responsibility to provide access in light of their influence on public decision making.

At the same time, women cannot morally justify pursuing an agenda targeted solely at the interests of those descriptively categorized as women. Some women do not claim to be marginalized or excluded as women. In addition, the problems made visible by patterns in many women's experience may well affect members of other groups who do not conform to the dominant culture or practice.<sup>24</sup> The claim of moral authority asserted by women, people of color, and other less powerful groups depends in part on their role as a signal and marker of institutional shortcomings that affect a larger, if less visible group.

On a theoretical level, there is a pressing need to reconceptualize race, gender, and class in relation to each other and to the project of progressive institutional change. Each of the separate critiques of the legal profession challenges the adequacy of existing categories of analysis. Law and lawyering no longer evoke clear and distinctive meanings and boundaries. Lawyers' work and roles increasingly intersect with other gatekeepers and problem-solvers.<sup>25</sup>

Similarly, the boundaries and content of the category "woman" are contested and ambiguous. It is difficult to justify theoretically an exclusive focus on women's experience as a critical lens on legal education when those experiences do not necessarily characterize all women and may be shared by members of other groups. There are common themes, patterns, and overlapping concerns that recur in the areas of feminist theory, critical race theory, and critical economics. Each of these areas has begun to grapple with problems of intersectionality: multiple aspects of identity and experience that shape and render unstable the category of analysis that frames any one of these areas.<sup>26</sup> Each identity group has come up against the dilemma of difference: how can differences that matter be taken into account without perpetuating the subordinating aspects of those differences?<sup>27</sup>

Those who are engaged in each of these areas of critical inquiry have begun to recognize the importance of expanding to include other critical frameworks, yet most continue to focus attention and theorize from the foundation of a singular dimension of identity.<sup>28</sup> This singular focus is legitimate and important. Race, gender, class, sexual orientation, and disability are not fungible, and their distinctive positions and histories warrant distinctive study and teaching.

It is also important, however, to link these discourses in a shared project that respects the distinctiveness and importance of the contributors. Examining

---

24. See *infra* notes 73-75 and accompanying text.

25. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 113-16 (1991).

26. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-Racist Politics*, U. CHI. LEGAL. F. 1989, at 139, 141; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-86 (1990).

27. See MINOW, *supra* note 22, at 19-23; IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 157-58, 168-73 (1990); see also Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 760-63 (1994) (summarizing the difference dilemma).

28. See Resnick, *supra* note 22, at 1536-43.

institutions and culture through the lens of only one critical perspective inevitably distorts a more complex and dynamic problem or context.<sup>29</sup> It also tends to invite inquiry by a relatively monolithic group that may not reflect the intersectional nature of experience and perspective. As others have noted, proceeding from the vantage point of only one group will inevitably be both over and under inclusive.<sup>30</sup> Finally, it stands in the way of developing new paradigms that can begin to reshape public discourse in progressive directions.<sup>31</sup> A crucial theoretical challenge facing feminist theory in particular and critical theory in general stems from this simultaneous pull in the direction of both particularity and commonality. How can we preserve and respect the distinctiveness of race, gender, and other groups and yet engage in the project of linking critical theories in common space and shared projects?<sup>32</sup>

The project of pursuing gender justice<sup>33</sup> in ways that do not essentialize, over simplify, or polarize requires a shifting frame that considers women's situation both on its own terms and as part of an overall institutional analysis and critique. The project of redefining and revitalizing the legal profession, embraced by many groups for varying reasons, takes place in an institutional context where women's angle of vision is both visible and illuminating, and can be linked with other forms of critical inquiry.<sup>34</sup>

This article presents one promising framework for reconceiving the relationship of categories of exclusion to each other and to the institutions within which they operate.<sup>35</sup> The experience and perspective of women and other marginalized groups provides a critical understanding of legal education generally. Conversely, meaningful and full participation of women and people of color in legal education and the legal profession depends on retheorizing these institu-

---

29. See Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1551 (1993) ("To divide the world solely along gender lines is to ignore the ways in which biological status is experienced differently by different groups under different circumstances.").

30. See Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1050-54 (1992); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1790-93 (1991).

31. See Rhode, *supra* note 30, at 1793 (discussing the challenge of transforming power structures through a contextual analysis of sex-based differences).

32. See Resnick, *supra* note 22, at 1542-43.

33. This type of analysis applies to the range of previously disadvantaged groups seeking access to justice and fair treatment as citizens.

34. See Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071, 1072 (1992) (urging scholars to go beyond gender-typing behaviors and instead challenge accepted methods of lawyering).

35. The conceptual framework developed here is set forth in an article I wrote with Lani Guinier entitled *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, *supra* note 17, at 1008-34. This article calls on critical scholars to identify spaces or projects that are widely shared yet experienced quite differently by differently situated individuals. An example of a common site for critical theorizing and practice comes from Farah Griffin, an English professor at the University of Pennsylvania. She chose migration narratives as the focus of her research, in part because those narratives tap into a widely shared experience that is not captured by any particular group. At the same time, migration has been experienced and framed quite differently by particular groups, and thus preserves and helps understand the importance of voice.

tions as a whole.<sup>36</sup> In other words, patterns of exclusion are signals of more general institutional dysfunction.

Women and other marginalized groups are like the miners' canary.<sup>37</sup> Miners used to bring a canary into the mines with them as a way of detecting toxicity in the air. When the canary became sick or died, miners knew that the environment had become toxic for everyone. Women and other marginalized groups can play a similar role. When they fail to thrive in particular institutions, their experience is often a signal of a more general or systemic problem that affects a much larger group. Other signals of both problem and progress are lacking. Often, problems only become visible when they converge around a particular visible group. The presence of women enables observers to see. The pressure to respond to concerns of excluded groups disrupts patterns of organizational inertia, and creates an opportunity to take from the margins and rethink the whole. The experience of women and other previously excluded people can provide an angle of vision enabling the transformation of legal education to prepare lawyers and law for the twenty-first century.

Those concerned about women's inclusion in the profession need to explore ways to frame their agenda to link these simultaneous yet separate discourses. How can women's experience in law school and in the profession offer a window onto more general institutional limitations? The context of professional schools can be used to ask the question that applies to all education: what is the role that graduates are currently being prepared to serve? How does that role square with the demands of a changing economy and workplace—changing in response to both technological and economic developments and to shifts in demographics? Does that role equip graduates to function productively and constructively as citizens of both the profession and the community?

This article illustrates the promise and the necessity of bringing multiple conversations together. It also casts law schools as key players in connecting these conversations (or keeping them apart). This work is part of a more general project: rethinking the law of the workplace. Workplace practices develop without consideration of their race or gender implications, and crises that arise around the exclusion or unfair treatment of women and people of color are addressed only after they erupt. Issues of gender and race typically are treated as add-ons. I urge the integration of issues of race and gender, workplace participation, democracy, and economic revitalization. In the intersection of these diverse concerns lies the most promising site for pursuing each of them.

### III. CONVERGING CRITIQUES: WOMEN AND THE LEGAL PROFESSION

Those concerned about women, legal education, and the legal profession define the problems of exclusion and dysfunction to include, if not to flow from, the dominance of the gladiator model of legal education and the role of lawyers.

---

36. See Cahn, *supra* note 30, at 1041.

37. This analysis builds on the framework articulated in *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, *supra* note 17. I learned of this metaphor from Gerald Torres and Lani Guinier, who are collaborating on an article on this subject. Others have used this metaphor also. See, e.g., Ann Lewis, *Speaking for Ourselves*, 38 N.Y.L. SCH. L. REV. 125, 125 (1993) (saying that women are the "miner's canary of the American economy . . .").



The gladiator model defines successful lawyering as fighting to win an argument or a conflict.<sup>38</sup> This mode of analysis frames the lawyer's role, even when lawyers operate outside formal adversarial settings. Lawyers are frequently brought in not to participate in planning strategy or designing effective and lawful systems, but instead, to insulate clients' decisions and actions from successful legal challenge.<sup>39</sup> Lawyers assess the legal vulnerability of particular courses of action and then position their clients to prevail should a legal challenge arise. This may mean packaging clients' decisions in legalistic language, developing document control policies that limit the capacity to reconstruct the basis for contested actions, and figuring out ways to discourage aggrieved parties from suing.<sup>40</sup> Legal problems function in this model as an add-on or diversion from the business at hand.<sup>41</sup>

Lawyers who challenge government, corporate, or individual practices also tend to define their role as winning a legal battle. Community and social issues are thus redefined as legal issues. Community organizers describing their experience with public interest lawyers eloquently capture this phenomenon:

---

38. See The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 216-32 (1992) (discussing "Rambo" litigators); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 511 (stating that according to the dominant popular view, "litigators rarely cooperate to resolve disputes efficiently. Instead, shielded by a professional ideology that is said to require zealous advocacy, they endlessly and wastefully fight in ways that enrich themselves but rarely advantage the clients."); Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 6-7 (1994).

39. Robert Gordon offers a vivid description of the professional role of many in-house counsel:

[T]heir advice is reactive, given only when asked for, accepting as the "client" whatever manager at whatever level consults it, and accepting the "problem" and the corporation's "interest" as defined by that manager; their advice is in the form of neutral risk-analysis; and they do not ask what happens when the "client" leaves their office—unless required to perform monitoring or auditing functions, in which case they will confine themselves to asking formal questions and receiving formal responses. Under attack by regulators or civil adversaries, they will view their function as simply minimizing liability in every case.

Gordon, *supra* note 10, at 274, 281-82.

40. See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Firm Practice*, 37 STAN. L. REV. 399, 415-17 (1985) (developing a "counter-image" of corporate practice in which "lawyers are more likely to spend their time writing insurance provisions against calamities that usually do not occur than constructively shaping the course of events.").

41. See Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 435 (1989). An example of this adversarial, gladiator model emerges from my observation of lawyers' roles in counseling organizations on how to deal with the issue of sexual harassment. I recently observed a meeting in which a general counsel offered advice to managers on how to deal with sexual harassment. Based on the questions and level of interest, it appeared that many of the managers in the room took the issue of sexual harassment seriously, both as a problem for women and a signifier of potential problems in the overall power relationships among workers and their supervisors. Many questions focused on how they could be proactive in their approach to sexual harassment, to integrate their response to sexual harassment with an effort to promote constructive working relationships within their staff.

The general counsel's response revolved around steps that could be taken to minimize the likelihood that they would have to produce potentially damaging records in the event a manager were sued. Don't keep records. Practice defensive management. Contest every claim of wrongdoing or inaction. Certainly do not set up a committee to improve the situation or publish such a committee's findings. It will be used against you in litigation. In short, every dispute is a battle, and a lawyer's role is to win.

Lawyers have killed off more groups by helping them than ever would have died if lawyers had never showed up.

Most organizations when they come up with a problem - they turn it into an issue and then they get stumped and then they call a lawyer . . . .

Most lawyers do not understand about organizing. Lawyers do not understand that the legal piece is only one tactic of organizing. It is not the goal . . . .

Lawyers tend to focus only on the case and want the organization to bend itself to the case rather than the other way around. Lawyers think in terms only of what will help or hurt the case, but they do not understand that "the case" is not the point of building up the community.<sup>42</sup>

The gladiator model thus persists across a wide variety of professional roles. It values toughness, intellectual rigor, and competitiveness. Crisis management, damage control, and high profile battles constitute the glamour work of lawyers. Success is defined as winning, especially against the odds.

Legal education plays a pivotal role in socializing lawyers to the primacy of the gladiator model. Law schools' pedagogy, curriculum, and placement tend to be structured around this one-size-fits-all gladiator model of lawyering.<sup>43</sup> The gladiator model channels who is accepted into law school: those predicted to be analytically rigorous, as measured by performance on law school entrance exams.<sup>44</sup> It frames the content of the curriculum, which is organized around an adversarial, litigation model aimed at using tools of analytic reasoning to advance a claim and win an argument.<sup>45</sup> It structures how students are taught: in large, hierarchical classes emphasizing quickness and performance, as opposed to deep thinking and communication.<sup>46</sup> It emerges in the prevailing system of

42. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 457-59 (1995) (quoting Ron Chisolm, an African American organizer); see also GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 3 (1992) ("What these activist lawyers did seem inclined to do was to equate what they already did best (or most often) with what would most help us."). Further:

[The] [t]est case model's emphasis on winning legal battles reinforces advocates' predisposition to rely exclusively on formal, adversary process . . . . Advocates frequently adopt a reactive posture of waiting for problems to arise and then returning to court for an adjudication of continuing violations of the court order . . . . This scenario fails to create a framework for developing workable solutions to the legal violations and perpetuates the defensive posture that predisposes responsible officials to resist judicial involvement.

Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 714-15 (1993).

43. See Guinier et al., *supra* note 1, at 45 ("One's place in the [University of Pennsylvania] Law School hierarchy is orchestrated by a mandatory grading curve, large Socratic classrooms, skewed presentations of professional identity, and fierce competition."); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 599 (1994); Rhode, *supra* note 29, at 1554.

44. See Oko, *supra* note 20, at 203-04 & n. 74; Guinier, et al., *supra* note 1, at 23 & n.70, 27 & n.74.

45. See Rhode, *supra* note 1, at 50 ("Conventional classroom hierarchies encourage extremes of both unreflective passivity and aggressive competition."); Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571, 1572-76 (1993).

46. See Brest & Krieger, *supra* note 7, at 532; Sarat, *supra*, note 7, at 43-46 (discussing the inability of attorneys to communicate with their clients).

evaluation: issue spotting, timed exams, and an emphasis on abstract analytical reasoning.<sup>47</sup> All of these aspects of dominant law school culture are highly individualistic in their mode of learning, performance, and evaluation.<sup>48</sup> Determining winners and losers defines the pattern of interaction, both substantively and pedagogically.

The organization of large firm practice also institutionalizes this gladiator model of lawyering. In a recent study of New York City law firms by Cynthia Fuchs Epstein, lawyers referred to the desirability of "pursuing a scorched earth approach."<sup>49</sup> Indeed, the process of promotion to partner has been dubbed "the Tournament of Lawyers."<sup>50</sup> Associates "joust" for partnership, attempting to position themselves over their peers through strategic decisionmaking, aggressiveness, and high billable hours.<sup>51</sup> In many firms, lawyers' success and commitment are measured by the number of hours they bill.<sup>52</sup> Billing practices, the pressures of the market, professional ideology, and the depersonalization of legal communities have all contributed to the prevalence of the gladiator model.<sup>53</sup>

This image and practice of lawyer as gladiator is not descriptive of the range of roles that many lawyers play or of how many lawyers work,<sup>54</sup> yet it persists in defining the culture and paradigm of the profession. The preeminence of the gladiator model has significant implications for women's participation in particular and the legal profession in general. Recent studies have documented that, although progress has been made in bringing women into law schools and firms, they continue to experience marginalization and exclusion in the present educational and professional system. Women's entry into law schools in large numbers has not been enough to achieve genuine inclusion and full participation in law school. Women as a group participate less in class<sup>55</sup> and are underrepre-

---

47. Rhode, *supra* note 29, at 1557; James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 18 U. MICH. J.L. REFORM 251, 254-55 (1985).

48. See Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 533-39 (1978); Rhode, *Missing Questions*, *supra* note 29, at 1556 (noting the individualistic ethos of legal education).

49. Epstein et al., *supra* note 1, at 364.

50. GALANTER & PALAY, *supra* note 25, at 3.

51. See *id.* at 100-02.

52. See Epstein et al., *supra* note 1, at 379-80 ("There is near consensus that obtaining what a number of lawyers refer to as the 'brass ring' of partnership hinges upon the demonstration of commitment to the firms' traditional standards of constant availability and unflagging dedication to professional life.").

53. See Gilson & Mnookin, *supra* note 38, at 534-50 (documenting and attempting to understand varying levels of cooperativeness among lawyers, both individually and as a legal community).

54. Cf. Gordon, *supra* note 10, at 281-82 (citing a study suggesting that corporate legal departments fall into two general groups, only one of which adopts a broad view that includes building compliance goals and prevention and monitoring mechanisms which will become part of company policy and practice).

55. See Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141-42 (1988); Guinier et al., *supra* note 1, at 33 n.86, 37-38; Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 147-54 (1988); Elizabeth Mertz et al., *Race, Gender and Status in Law School Education: A Study of Eight Contracts Classrooms* 46-47 (1996) (unpublished manuscript) (on file with the *Duke Journal of Gender Law & Policy*) (finding that male students participated at greater rates than female students in six out of eight classrooms studied; male students had between 10% and 54% more turns at speaking than did female students; men

sented in positions of leadership and status.<sup>56</sup> Studies have found that at some schools women underachieve relative to their own Law School Admission Test (LSAT) scores and undergraduate GPA's, as well as relative to men.<sup>57</sup> Many law schools operate within a culture that tolerates or condones students' behavior that actively excludes, harasses, and devalues their female colleagues.<sup>58</sup>

Women continue to face particular obstacles to participation when they enter the profession. Despite increasing numbers at entry levels of the profession,<sup>59</sup> women generally are not making their way into positions of power.<sup>60</sup> They are not achieving partnerships<sup>61</sup> or judgeships<sup>62</sup> in proportion to their numbers, nor are they earning as much as their male counterparts.<sup>63</sup> There is some indication that women and people of color suffer in greater proportion in the current,

---

took between 12% and 38% more time speaking than women).

56. See ELUSIVE EQUALITY, *supra* note 1, at 10; Guinier et al., *supra* note 1, at 26-28.

57. See Guinier et al., *supra* note 1, at 21-26; see also WIGHTMAN, *supra* note 1, at 18-19 (giving a detailed quantitative analysis of nearly 30,000 first year law students from more than 150 law schools and finding that the undergraduate performance of women was slightly higher than that of men, yet the law school academic performance of women was lower than that of men). But see Paul W. Mattessich & Cheryl W. Heilman, *The Career Paths of Minnesota Law School Graduates: Does Gender Make a Difference?* 9 LAW & INEQ. J. 59, 67-73 (1990) (finding that women did as well or better than men in terms of grades, law review participation, and moot court competitions).

58. See UNFINISHED BUSINESS, *supra* note 1, at 4-5 (noting reports of "overt animosity toward women by their male peers, and of the law schools' refusal to recognize and rectify such behavior."); WIGHTMAN, *supra* note 1, at 26 ("Law school is not an environment that nurtures the academic development of women."); Guinier et al., *supra* note 1, at 52.

59. In 1968, seven percent of law school students were women, and by 1995, approximately 44% of all first year law students were women. See BASIC FACTS, *supra* note 1, at 1. In 1960 only 210 of 9150 (three percent) of lawyers admitted to the bar were women. See *id.* In 1995, women comprised 23% of the profession. See *id.*

60. See Gellis, *supra* note 2, at 941; *Executive Summary*, *supra* note 2, at 2157-60; Resnick, *From Classes to Courts*, *supra* note 2, at 2198-99.

61. In 1994 only "13% of law firm partners were women." BASIC FACTS, *supra* note 1, at 3; see also Epstein et al., *supra* note 1, at 317 (finding that in 1994 at eight large New York firms, 12% of the partners were female, as compared to 40% of the associates); Eleanor Kerlow, *Mirroring Economy, Hiring and Promotion of Women Remains Flat*, 13 OF COUNS. 700; 1994 ANNUAL SURVEY OF THE NATION'S 700 LARGEST LAW FIRMS, May 2-16, 1994, at 25 (showing that although more than 38% of all associates in 480 of the largest U.S. firms in 1993 were women, only 12.5% of all partners were women).

62. As of September 1995, only 12% of the federal judiciary were women. See UNFINISHED BUSINESS, *supra* note 1, at 14. This number includes President Clinton's appointees, of whom a record 31% were women. See *id.*

63. See Rhode, *supra* note 1, at 58-59 ("Women, particularly women of color, are significantly overrepresented in the least prestigious and least remunerative areas of practice and significantly underrepresented among the most elite positions."); Mattessich & Heilman, *supra* note 57, at 98-100 (noting that in 1990, 48% of female lawyers were earning \$40,000 or less, while only 28% of males were in this category. "Men are much more likely than women to earn these higher incomes: almost half (42%) of the men earn \$60,000 or more, in contrast to only 25% of the women."); cf. HILARY M. LIPS, *SEX & GENDER: AN INTRODUCTION* 298-299 (1988) (discussing pay inequity for men and women generally).

unstable economic environment of the legal profession.<sup>64</sup> Women of color face particular patterns of exclusion within the legal profession and the legal academy.<sup>65</sup>

There are strong indications that the dominance of the gladiator model bears some relationship to the undervaluation of many women, either in traditional terms or on their own terms, in law school. Not all women, or for that matter not only women, experience legal education this way. Nor does the perception that the gladiator model of legal education tends to exclude or marginalize women at a disproportionate rate rest on the premise that women's voice is inherent or fixed. Rather, the gladiator model disproportionately and visibly excludes many women. These women's experiences serve as markers for a broader exclusionary impact.

There is some evidence that the overwhelming emphasis in law classes on conflict, winning a fight, and demonstrating the capacity to demolish opposing perspectives contributes to lower levels of participation.<sup>66</sup> The structure and implicit culture of the gladiator model tolerates and may encourage peer harassment, one of the more enduring forms of exclusion in the law school culture.<sup>67</sup> The law school examination system, with its focus on issue spotting and quickness, devalues other aspects of successful performance that may be as or more important to successful performance as a lawyer.<sup>68</sup>

The impact of the gladiator model on women's advancement in the legal profession has been well documented.<sup>69</sup> Cynthia Fuchs Epstein found in her study that "[w]omen have fared poorly under the 'up and out' system."<sup>70</sup> The Supreme Court has acknowledged the phenomenon of the "double bind" created by the insistence on a gladiator model: women face criticism for either conforming to the gladiator model and failing to be adequately feminine, or failing to be aggressive enough and thus not performing well.<sup>71</sup> The legal profession

---

64. See Epstein et al., *supra* note 1, at 313 ("The perception of many women in top firms was that women suffered in greater proportions in this changing environment, being laid off more than the men and becoming disadvantaged in the evaluation process for partnership."). For a discussion of some of the challenges posed by changing economic conditions, see *infra* notes 87-92 and accompanying text.

65. See BURDENS OF BOTH, *supra* note 1, at 11-27; Rhode, *supra* note 1, at 58-59. As of 1990, less than three percent of all lawyers and judges were minority women. See BASIC FACTS, *supra* note 1, at 5.

66. See generally sources cited *supra* notes 55, 58.

67. See ELUSIVE EQUALITY, *supra* note 1, at 8-12; Banks, *supra* note 55, at 137-39.

68. See Brest & Krieger, *supra* note 7, at 532 (criticizing the dominance of the appellate case method because it "offer[s] students little opportunity to develop the skills of the legal counselor."); RHODE & LUBAN, *supra* note 5, at 910 ("All too often, exams graded on a predetermined scale function less to teach than to rank."); Guinier et al., *supra* note 1 at 80, 91.

69. See generally MONA HARRINGTON, WOMEN LAWYERS: REWRITING THE RULES 15-40 (1994) (analyzing large firm rules and firm culture as among the greatest barriers to assimilation of women into the profession).

70. Epstein et al., *supra* note 1, at 358.

71. See Price Waterhouse v. Hopkins, 490 U.S. 228, 233-37 (1989) (noting that female partnership candidates are expected to be strong managers without losing their femininity); see also Epstein et al., *supra* note 1, at 365-67 (discussing how stereotypes about gender affect perceptions of performance); Mary Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 486-503 (1990) (discussing how personality traits are labeled as masculine or

typically is structured in ways that conflict with the demands of many women's lives (and many men's for that matter).<sup>72</sup>

As others have observed, the experience of women is an extreme version of a more pervasive crisis in the legal profession.<sup>73</sup> Although its impact perhaps is most visible for women and people of color, the gladiator model is also problematic for others who learn differently, embrace different values, or pursue their role in different ways. The one-size-fits-all approach to teaching and evaluation silences and undervalues those with different learning styles and visions of themselves as lawyers. It encourages a peer culture of harassment and exclusion, and socializes students to a model of disrespect, anti-intellectualism, and abdication of social responsibility.

One possible response to this critique of the gladiator model of legal education is to locate the problem with those who do not fare well within it, rather than on the model itself.<sup>74</sup> This response rests on the assumption that this model dominates the profession, and thus it is crucial that students be socialized to operate within it.<sup>75</sup> However, the gladiator model is contributing to a crisis in the legal profession as well. Law schools may well be socializing students to operate within a model of professionalism that is deeply problematic in the current economic and political world.

Although more men are able to survive and advance within the pressures of the tournament, the individual survivors and the profession as a whole suffer the consequences, particularly in the context of current economic realities. Some firms are not growing, some are laying off workers, splitting, or disbanding.<sup>76</sup> Because of current economic uncertainty, firms increasingly view their existence as fragile. There are fewer opportunities for advancement for young lawyers. The percentage of associates promoted to partner has dropped.<sup>77</sup> The culture of cost-cutting as business' approach to profitability also is affecting the legal profession. The increased reliance on in-house counsel by many corporations is reducing some of the bread-and-butter, long term client relationships that firms

---

feminine and are valued differently in the workplace).

72. See generally Amy Bach, *Nolo Contendere*, NEW YORK, Dec. 11, 1995, at 49 (discussing the reasons female lawyers leave large law firms).

73. See Epstein et al., *supra* note 1, at 446 ("Not only are women adversely affected by the pressure to work harder and longer hours in the hope of achieving partnership . . . critics also feel it is a problem for the legal profession more generally, preventing lawyers from serving society as they have traditionally."); Shalleck, *supra* note 34, at 1071 (urging the importance of linking critiques of women's exclusion to the challenge of rethinking accepted methods of lawyering).

74. See, e.g., Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOYOLA U. CHI. L.J. 449, 484 (1996) (recognizing that not only white males, but also women and minorities have been able to master learning under this model).

75. See Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 747 (1995) (arguing that the case method classroom enhances skills that are crucial to performing lawyers' work, which "must often and perhaps ordinarily be performed under equal or greater duress. Professors . . . may in this respect be performing an important service for their students, and especially for those who are most intimidated.").

76. See Dale H. Seamans, *In 1996, Big Firms Must Be 'Lean and Mean,'* MASS. LAW. WKLY., Mar. 11, 1996, at B3 (discussing how market changes and poor planning by law firms have resulted in corporate clients becoming far more selective and grudging in doling out legal work, causing financial problems for some law firms).

77. See GALANTER & PALAY, *supra* note 25, at 63-65.

previously enjoyed.<sup>78</sup> Lawyers and firms face greater competition for clients.<sup>79</sup> Lawyers themselves generally are held in low public esteem.<sup>80</sup> Lawyers and commentators also have expressed dissatisfaction with their careers.<sup>81</sup>

In an effort to rectify some of these problems, lawyers and scholars of the profession are engaged in a struggle to redefine a professional role that responds to the current instability and dissatisfaction within the profession.<sup>82</sup> There is a search to reclaim the public image and the soul of the profession.<sup>83</sup> There is a search to reclaim the joy, pride, and integrity of the profession.<sup>84</sup> There is also a search to hold on to the legal profession's position in the marketplace.<sup>85</sup>

These critiques of legal education and the legal profession are not new. They have surfaced repeatedly over the decades.<sup>86</sup> But these concerns have taken on particular urgency in the context of changes in the surrounding economic context of legal work. The gladiator model is built on an economic and professional model that is in flux and, in some contexts, may be dysfunctional in the twenty-first century workplace. The demands of the global economy and technology have created tremendous economic uncertainty and have led to signifi-

78. See Nelson, *supra* note 9, at 355 ("The general service relationships that had existed between many clients and law firms were displaced by transaction-specific or field-specific relationships monitored by inside counsel.").

79. See GALANTER & PALAY, *supra* note 25, at 52 ("The new aggressiveness of in-house counsel, the break-down of retainer relationships, and the shift to discrete transactions have made conditions more competitive.").

80. See LINOWITZ, *supra* note 13, at 24 (discussing how some Americans think lawyers are less honest than most people); Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 (discussing public dissatisfaction with lawyers and the legal system); Randall Samborn, *Anti Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (discussing widespread resentment of lawyers).

81. See, e.g., Epstein et al., *supra* note 1, at 378-90 (discussing generally long hours and unpredictable schedules); Carol McHugh Sanders, *Psychoanalytic Services Center Is Reaching Out with Own Practice Group for Stressed Out Lawyers*, CHI. DAILY L. BULL., July 25, 1996, at 1 (discussing growth in the need for professional mental health services for lawyers). Lawyer dissatisfaction is so widespread and problematic that a task force of the Law Practice Management Committee of the American Bar Association was created to cope with the crisis. This task force blamed the shortsightedness of professional leadership, the structural problems created by an overemphasis on hourly billing, and the organization of firms around a competition for partnership. See Marilyn Astin Tartlton & Simon Chester, *It's Broken but We Can Fix It: Developing a Plan to Move the Profession Beyond the Breaking Point*, 22 L. PRAC. MGMT., Mar. 1996, No. 2, at 24.

82. See, e.g., A.B.A. COMM'N ON PROFESSIONALISM IN THE SPIRIT OF PUB. SERV.: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 12-15 (1986) [hereinafter A BLUEPRINT] (discussing recommendations for improving professionalism). See generally KRONMAN, *supra* note 5 (discussing a crisis of morale in the legal profession); LINOWITZ, *supra* note 13 (discussing cynicism about the profession); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS, LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Nelson et al. eds., 1992) (discussing a decline in professionalism among lawyers).

83. See KRONMAN, *supra* note 5, at 354-81; Menkel-Meadow, *supra* note 43, at 615-22.

84. See A BLUEPRINT, *supra* note 82, at 47; LINOWITZ, *supra* note 13, at 19.

85. See Nelson & Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in LAWYERS' IDEALS, LAWYERS' PRACTICES, *supra* note 82, at 1, 14 (describing the "fears of the leaders of the organized bar that the profession [is] losing the very legitimacy that protected it from attacks on key aspects of its professional monopoly.").

86. See *id.* at 2.

cant changes in the internal governance of corporations.<sup>87</sup> Recent economic trends are destabilizing organizational boundaries, creating large pools of temporary workers, and altering managerial practices. The workers of the future, including legal workers, need to be highly trained and flexible synthesizers, integrators, and collaborators who work in teams at all levels of production.<sup>88</sup>

Much of the conversation and analysis about the organization of legal work assumes the continued vitality of a traditional, centralized, top-down approach to legal organization and legal work. There is, however, a growing literature on the role of in-house and corporate counsel that documents the increase in number and significance of in-house counsel.<sup>89</sup> Yet the litigation model continues to drive much of the analysis of lawyers' roles.<sup>90</sup> The normative models of professionalism often hold fast to the conception of individual expertise, mastery, and autonomy, even as the circumstances surrounding the exercise of professional roles change.<sup>91</sup> Legal doctrine and practice embody a set of assumptions about organization of work: stable workplaces, vertical hierarchies, centralized management, primary long-term identification with a single employer.<sup>92</sup>

87. See Robert B. McKersie & Richard E. Walton, *Organizational Change*, THE CORPORATION OF THE 1990S: INFORMATION TECHNOLOGY AND ORGANIZATIONAL TRANSFORMATION 244, 249-50, 255-56 (Michael S. Scott Morton ed., 1991), (discussing greater interdependence among workers necessitated by technological change); Nelson, *supra* note 9, at 349 ("Even though most large companies continue to succeed, they confront a more uncertain external environment and have experienced significant changes in internal governance."); Paul Osterman, *The Impact of IT on Jobs and Skills*, in THE CORPORATION OF THE 1990S, *supra*, at 220, 220-243 (discussing effects of technological change on the nature of modern jobs and identifying greater overlap among worker responsibilities as one of the effects); John Rockhart & James E. Short, *The Networked Organization and the Management of Interdependence*, in THE CORPORATION OF THE 1990S, *supra*, at 192, 192 (discussing increased interdependence introduced by information technology including shared goals, shared work, shared decision-making, and shared responsibility); cf. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 879-903 (1994) (discussing changes in the governance of labor organizations).

88. See, e.g., *Successfully Moving Up: Hiring in Times of Change*, CORP. LEGAL TIMES, May 1996, at 44 (roundtable of corporate counsel and headhunters discussing the need for modern lawyers to be able to work in teams and have strong interpersonal skills, not just technical abilities).

89. See, e.g., ABEL, *supra* note 5, at 168-72 (discussing the growth of in-house counsel positions); GALANTER & PALAY, *supra* note 25, at 49; EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 70-106 (1986) (discussing corporate counsel positions); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985) (describing the corporate counsel position); Nelson, *supra* note 9, at 355 (describing the pivotal role that inside counsel has assumed, and the reshaping of relationships between clients and outside counsel as a result); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment, and Organizational Representation*, 64 IND. L.J. 479, 480 (1989).

90. See, e.g., Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 873 (1990) (employing the problem of clients' use of strategic litigation as the vehicle for applying economic analysis to professionalism).

91. See generally Jeff Coburn, *What Law Firms Should Learn From Corporate America*, AM. LAW., June 1996, at 23 (comparing the management styles of the top American companies which value qualities such as use of teams, wide sharing of information, maximum employee trust and delegation, and receptiveness to change, with dominant styles of major law firms which are described as elitist, secretive, nonparticipatory, hierarchical, and change averse); Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 714 (1988) (discussing the role of the lawyer on a team).

92. See generally PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND*



Both the doctrine and the concept of professional role have yet to come to terms with the changing context within which the profession operates.

The dominance of the gladiator model in legal education and the legal profession poses serious obstacles both to women's access and to the profession's capacity to craft a model of lawyering that is responsive to changing times. The model does not accurately depict the range of demands on lawyers, including counseling, mediating, advising, planning, problem-solving, and facilitating transactions. It unfairly and ill-advisedly undervalues students with the capacity to excel in these areas. The gladiator model does not prepare students to meet the demands of a changing world, and creates conditions that disable students who may be well-suited to meet those demands. It does not provide the profession with resources to respond proactively and constructively to the crisis it faces. It also fails to provide leadership in helping the legal profession redefine a constructive professional identity that is both inclusive and functional.

#### IV. REORIENTING THE PROFESSIONAL PARADIGM: LAWYERS AS PROBLEM-SOLVERS<sup>93</sup>

The foregoing critique lays a descriptive and normative foundation for rethinking the prevailing paradigm of legal professionalism. It may be that the profession has diversified to the point that no single, central, organizing paradigm will be adequate.<sup>94</sup> At the least, the overarching concept of professionalism may need to be one that is inclusive, if not integrative, of a variety of roles and functions. The gladiator is not the exclusive and in the future may not be the most comprehensive or functional professional model of lawyering. Until recently, private firm practice dictated the norms and ideals of the profession, even for those who functioned in other roles or settings. As the power and patterns of professional roles shift, the direction and content of professional role definition also may be in the process of reconfiguration. Lawyers functioning in organizational context, within corporations and non-profit organizations, may be assuming greater power and importance. These lawyers may be developing a different model of lawyering: a model I tentatively call the lawyer as problem-solver.<sup>95</sup> This model may in turn influence the professional role of private practitioners.

---

EMPLOYMENT LAW (1990) (discussing various workplace topics including governance, the employer-employee relationship, and the future of American labor law).

93. As a way of entering this conversation about reconceiving lawyers' roles, I have employed the label "problem-solver" as the place-holder for the role of lawyer operating proactively to meet the demands of an organizational client. This word does not fully capture the nature of the role I put forth. It fails to capture the ideas of integrating and translating different disciplines, making law real on the ground, linking the aspirational and the practical, and giving a sense of the relationship of legal requirements to organizational practices and goals. I continue to search for a more appropriate label as part of the project of developing this conception of law and lawyering.

94. See Wallace Loh, *Introduction: The MacCrate Report-Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 507 (1994) (recognizing the difficulty in attempting to fashion a coherent set of goals for legal curricula at a time of great change within the profession).

95. See Quigley, *supra* note 42, at 460-61 (discussing the distinctive character and importance of lawyers who work for community organizations); Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 230, 232 (1993) (arguing that much of today's significant lawyering is general counsel or transactional work for community organizations); see also sources cited *supra* note 89, documenting the rising prevalence and importance of in-house counsel.

There is a normative dimension to this project of expanding and rethinking the gladiator model. The project of building a legitimate professional role in organizational context offers the possibility of linking lawyers' roles to the much needed task of developing a more democratic and inclusive vision of law and lawyering. The project of rethinking lawyers' roles in context is an important step in a much larger project of reconceiving the role of the state—a central task for critical theorists and progressives. As discussed below, it also offers a site for bridging the conversations about inclusion and professionalism in ways that reveal and build on the interdependence of these concerns.

The conceptual move to lawyer as problem-solver offers a more eclectic and contextually defined professional identity, although the label itself fails to capture the dynamic and structural dimensions I seek to embrace. To function as a problem-solver, a lawyer must develop a sense of professional role in the context of the demands and possibilities of the setting and problem at hand.<sup>96</sup> Instead of defining the problem in terms of whether present or proposed practice would violate a legal rule, the problem-solver first attempts to understand the problem in organizational terms. What are the goals, interests, and concerns of the stakeholders in a particular policy or practice? What types of problems, issues, or conflicts loom with respect to existing or proposed policies and practices? What is the relationship between the potentially problematic activity and the needs, interests, and goals of the organization? Are the existing systems of decisionmaking within the organization adequate to address competing interests and goals and to reach a fair and workable result? What alternatives exist to address problems or achieve organizational goals?

The lawyer as problem-solver helps explore the relationship between existing or proposed practice and legal norms. How does existing law bear on that practice? How do legitimate concerns of the organization interact with the norms embodied in legal rules? What are the incentive systems that influence perceptions of and reactions to legal norms? The problem-solver defines law and legal processes more broadly, dynamically, and proactively. The law functions as both an aspiration and a constraint. It does not define the problem; it is one of many factors that influence decisions and practices. The challenge is to build compliance with legal norms into the incentive structure and framework of operation, and in the process, to use the law and legal processes to enhance the fairness and productivity of the organization.

This approach to lawyering moves beyond a formalistic approach to law as applied to corporations, non-profit institutions, and community organizations. Law is more than a set of externally imposed rules to be followed, manipulated, or evaded. It consists of a set of practices and principles that emerge both outside of and in interaction with formal and instrumental law.<sup>97</sup> In other words, lawyers help translate legal rules into language and practices that are meaningful to those who must comply with and enforce those rules. The lawyer as prob-

---

96. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990) (discussing the meaning and importance of making decisions in context, which they define as signaling "a readiness, indeed, an eagerness, to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems.").

97. See Susan Silbey, *Ideals and Practices in the Study of Law*, 9 LEGAL STUD. F. 7, 20 (1985).

lem-solver brings together the meaning of those legal norms with norms that already have meaning within an organization, such as fair play, avoiding abuses of power, and rewarding good work. She seeks to treat legal and organizational problems structurally, rather than solely in a formalistic or case-by-case manner.<sup>98</sup> She can introduce to the decisionmaking processes routinely used within organizations certain basic principles of legitimacy that underlie the aspirations of American legal norms. These include participation, fairness, reasoned decisionmaking, and remediation.<sup>99</sup> Each of these concepts can be translated into organizational terms.

This view of lawyer as problem-solver builds on the idea of pluralistic praxis: the need to employ multiple skills and mobilize various kinds of knowledge to solve problems. Lawyers as problem-solvers face the challenge of reconciling norms of autonomy and integrity with the demands of operating as counselors, collaborators, facilitators of decisionmaking processes, and participants in managerial decisionmaking. Crisis management skills continue to be part of the repertoire of legal roles, yet they must be reconciled with the informal, integrative, and dynamic role of lawyer as problem-solver.<sup>100</sup>

Perhaps the best way to illustrate this view of lawyer as problem-solver in organizational context is with examples of legal interventions that use this problem-solving model. One story grows out of an intervention that I witnessed and participated in that involved developing a strategy for addressing sexual harassment at a university.<sup>101</sup> A lawyer was designated as the chair of a committee charged with the responsibility of assessing how well the organization had implemented its sexual harassment policy. This lawyer constructed and facilitated a process that brought together representatives of various constituencies within the organization. The working group included those with responsibility for responding to complaints, those with expertise in addressing sexual harassment issues, those most likely to be concerned about sexual harassment, and those most interested in minimizing intrusion into their professional autonomy. The lawyer established a process for defining stakeholders in the issue, building on informal networks of information and accountability, and crafting organizational solutions that would accommodate multiple and sometimes conflicting concerns. This process brought to the surface the people who knew about the

---

98. Cf. Quigley, *supra* note 42, at 458 (quoting Ron Chisolm, a community organizer, "What the groups really need is a lawyer with understanding and an analysis of the community group - who they are, what are their problems and what is their history.").

99. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1410-11 (1991) (identifying basic criteria of legitimacy in legal decisionmaking to consist of fairness, impartiality, participation, and principled decisionmaking).

100. Others have used the term "problem-solving" to carve out a model of conflict resolution that is non-adversarial, forward-looking, and contextually defined. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 758 (1984) (discussing a focus on actual objectives and creative solutions); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167, 168-70 (1989) (discussing the essential features of the problem-solving model). I am seeking a better term that also captures the organizational, structural, facilitative, and systemic dimensions of the role.

101. I did not attempt to study this effort systematically, and I have not revealed the identity or location to preserve confidentiality. I offer the story not as a model or a case study, but solely as a way of illustrating the meaning of the principled problem-solver model.

problems, the crises waiting to happen, and the relationship of sexual harassment to broader issues of organizational practice. It also brought together people who knew about and were a part of the existing networks of problem-solving and dispute resolution, which were not limited to the formal legal process set up to handle sexual harassment complaints. It included the people who would have to implement the policy on the ground and respond to problems when they arose.

The chairperson began by engaging the group in the process of identifying the nature and scope of the problem. She brought to the table an understanding of the legal obligation and exposure facing the organization. She charged the group with responsibility for developing an analysis of how the problem manifested itself and why the organization had failed to respond. The group established an agenda together, and the chair played the role of assuring that responsibilities were assigned to those best suited to analyze the issue, that committee members worked together when different perspectives or forms of expertise were needed to develop a workable and comprehensive solution, that the group's attention remained focused on addressing both the legal and organizational issues, and that particular outcome goals were articulated and met. The chair also played the role of recorder and reporter.

This group focused its energy on generating creative and proactive solutions, as well as ways of addressing crises. It evolved into a safe space where participants could brainstorm with others who were identified as adversaries outside the meeting room, or who came to the problem with different experiences and concerns. It identified flash points for conflict and likely areas of abuse. It identified existing groups that could provide safe spaces for taking proactive steps. It offered suggestions of how to build concerns about sexual harassment into the process of structuring relationships between graduate students and their faculty advisors. It explored ways of integrating training into the process of learning how to manage better and smarter. Instead of looking exclusively to legal rules and legalistic processes to solve this problem, the group linked the legal problem of sexual harassment with the organizational problem of managing unequal and amorphous relationships.

This approach to lawyering was less individualistic and combative than traditional models of the professional role.<sup>102</sup> It broke down the dichotomy between formal law and informal practice, and between public interest and private representation. Formal rules and processes were only a part of the legal regime. Managers at all levels were identified as primary legal actors who had responsibility for understanding and acting on legal norms. Moreover, there was an effort to create a more dynamic interaction between the definition of the legal rules and the identification of systems of practice that could be harnessed to implementing those rules. Advocacy groups primarily identified with protecting the interests of women and people of color played a critical role in identifying where the system broke down and how it could be improved. Insiders who were

---

102. Compare with the role of in-house counsel in advising supervisors on how to avoid liability for sexual harassment, described *supra* note 41.

concerned about the general problems of poor management and abuses of power were able to link those concerns to their proposed solutions.

This initiative required the lawyer who oversaw the process to act as a facilitator of preventive and informal legal culture, using formal legal norms and the adversarial process as the impetus and boundary setter. It expanded the concept of law and lawyering to include professional norms and administrative practice. It did not abandon the gladiator model, but rather reoriented its place to become the background rather than the foreground.

This story suggests how lawyers as problem-solvers can use the process of identifying stakeholders and potential collaborators to redefine legal problems in ways that can produce opportunities for innovation as well as avoid legal exposure. Legal professionals increasingly must be able to facilitate collaborations among diverse groups of professionals and clients. Practitioners have begun to respond to these new challenges, and law firms are in the process of expanding the types of services they provide.<sup>103</sup> Firms and organizational lawyers have assembled interdisciplinary teams of problem-solvers, including accountants, organizational consultants, scientists, economists, psychologists, etc. to better equip the firm to anticipate and respond to clients' needs.<sup>104</sup> Companies have begun hiring lawyers as in-house counsel to function as part of the team of decision makers who shape strategic planning as well as perform crisis management. These changes signal the need for lawyers to learn to work well as part of diverse teams. They also signal the increased importance of the lawyer's role as facilitator, integrator, and system builder. This definition of the lawyer as problem-solver may well come to redefine what it means to be a legal professional in a multi-disciplinary enterprise.

#### V. NEW PARADIGMS: LINKS BETWEEN WOMEN, THE ACADEMY, AND THE LEGAL PROFESSION

The shift to a problem-solver paradigm has the potential to better equip lawyers to function in roles that require an understanding of the particular organizational context. Lawyering in organizational context poses a critical challenge for the future of the profession and of women in the profession. How do lawyers maintain and revitalize the meaning of professionalism in this more embedded organizational context, in which they interact regularly with and are accountable to non-lawyers? If the economy and culture are changing, the images and roles of lawyers responding to a problem may have to change too. What role could and should lawyers play in this more decentralized, team oriented, participatory, interdisciplinary world?

These emerging challenges suggest the importance of an ongoing preoccupation of the legal profession: to rethink the meaning of professional expertise. It is no longer enough to look to lawyers as the gladiator, bringing information and the capacity to fight. The concept of expertise as mastery of information poses

---

103. See, e.g., Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 635-36 (1994) (describing "innovative 'ruptures'" in law practice organization).

104. See GALANTER & PALAY, *supra* note 25, at 66-68.

overwhelming challenges in an information age, with the availability of an insurmountable and rapidly changing volume of data and information. Expertise and professionalism increasingly entail exercising judgment and mobilizing people and information to solve complex problems. The lawyer's claim to professionalism in the twenty-first century may well rest on the capacity to bring together diverse skills and perspectives and to facilitate informed judgment and constructive action.

How will the legal profession adapt to and anticipate these trends toward collaborative, interdisciplinary, decentralized work teams? Like the economy at large, the legal profession may be at a critical turning point. It can take the high road by reshaping, retooling, and rethinking the profession to define a creative, empowering, vital, and dynamic partnership with business, non-profits, and workers at all levels. This would require engaging with the project of rethinking the role of lawyers, the model of the productive lawyer, and the structures in which lawyers work.

The legal profession also could take the low road in response to the challenges of the current economic and technological changes. It could continue the trend toward the mega-firm and the peon by increasing centralization, hierarchy, and deprofessionalization of line workers (in the legal context, associates). This would mean increasingly undesirable jobs for everyone, especially at the bottom of the hierarchy, where women and people of color are disproportionately located. In this scenario, larger firms would be competing for less and less business of the crisis management ilk.<sup>105</sup> Thus, the low road may spell the increasing obsolescence and impoverishment of the legal profession.

What does all of this talk about changing the model of lawyering have to do with women's inclusion? The consequences of taking the low road for women's inclusion in the legal academy and the legal workplace have been the subject of considerable scholarly and policy attention.<sup>106</sup> No one would dispute that the low road is bad for women's inclusion. The low road likely will spell the continued underrepresentation and underachievement of women.

Some strategies for addressing women's underrepresentation are essentially to add women and stir. The basic culture and norms of the profession will remain unchanged, with a few special accommodations around issues of pregnancy and dependent care. Barriers to women's inclusion often are looked at in terms of work and family issues, quality of life, and stereotyping of women that prevents fair opportunities for women's abilities and contributions to be assessed. Firms can address some of the health and family issues that constrain women's participation through add-on programs to the existing workplace structure.<sup>107</sup>

These incremental approaches also can include individual strategies to make workplaces and educational institutions more hospitable to a diverse group of students and lawyers.<sup>108</sup> Teachers can become more sensitive to patterns

---

105. See Steven Brill, *The Law Business in the Year 2000*, AM. LAW., June 1989, at 5.

106. See Epstein et al., *supra* note 1, at 363 (finding that "the increasingly competitive legal marketplace works to the detriment of women.").

107. See Rhode, *supra* note 1, at 63-64.

108. See Menkel-Meadow, *supra* note 103, at 656 (discussing proposals for improving the quality

of participation and discourse in the classroom and strive to equalize participation.<sup>109</sup> Workplaces can introduce diversity training to sensitize managers and co-workers about the various perceptions and experiences that others bring to the environment.<sup>110</sup>

These responses originate from women's need to integrate family and work, or from a need to reduce stereotypes about women in the profession. But these changes are unlikely to take root in a profession that operates from the assumption that tougher is always better, that to do battle is the mission, and that time is above all money. Full participation of women will be achieved only by linking women's inclusion to changes in the profession that are also prompted by economic and organizational interests. It is crucial to ground the discussion of women in the law in an analysis of the economic and political moment we occupy. These issues must be thought about in relation to the more general question of the workplace of the future. Where are work, corporate and business life, and economic organization going? What might they look like in the future? Given the options, what should they look like?

What impact would a move from gladiator to problem-solver have on the inclusion and meaningful participation of women and people of color in the profession? Obviously, this question cannot be answered at this stage because this move has yet to take root. I can only theorize and infer from other contexts and examples about the potential for this move to reduce barriers to participation and create opportunities for genuine inclusion.

Women may face fewer barriers to full participation in the role of lawyer as problem-solver. The gladiator role has developed a particular style that conflicts with stereotypes of femininity. With the gladiator role, women can become gladiators, but they face a double bind: being a successful gladiator means not being a "successful" woman.<sup>111</sup> The role of problem-solver has yet to be gendered in this manner. There are fewer stereotypes of problem-solvers—men and women both want to embrace this role. If women actively participate in shaping the role of problem-solver, it can be developed in multiple rather than singular patterns. Also, this team-oriented, problem-solving approach may create opportunities for women that would not otherwise exist. The opportunity to work as equals in collaboration with men may create conditions likely to reduce the hostility and bias that women currently experience.<sup>112</sup>

---

of life of lawyers through "managing diversity."); Rhode, *supra* note 1, at 61 (targeting parental leave, part-time work, and child care as policies in need of change).

109. See Wildman, *supra* note 55, at 147-48.

110. See JOHN P. FERNANDEZ, *THE DIVERSITY ADVANTAGE* 300-09 (1993) (describing specific diversity "best practices" in companies with diversity programs). For a critique of the diversity industry, see Heather MacDonald, *The Diversity Industry: Cashing in on Affirmative Action*, 209 NEW REPUBLIC, July 5, 1993, at 22.

111. Cf. *supra* note 71 and accompanying text; Jane Roland Martin, *Bound for the Promised Land: The Gendered Character of Higher Education*, 4 DUKE J. GENDER L. & POL'Y 3, 19-20 (1997) (discussing educated women as "living contradictions.").

112. See Samuel Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 SMALL GROUP RES. 224, 226 (1994) (discussing how common identity facilitates interpersonal interaction); cf. Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 438, 441 (1979) (describing how structured interracial work groups in schools increase self-esteem, morale, and interpersonal interaction).

A paradigm shift toward team-oriented productivity in law school and in the workplace also could help address the pervasive problem in legal education of peer hostility to women. Much of this hostility appears to be expressed in large group, hierarchical, and competitive settings characterized by relatively anonymous interactions among peers. Students self-select their partners in learning, and thus often miss the opportunity to work closely with people they perceive as different. This problem has been identified as a major source of exclusion and marginalization of women from centers of power, social support, and professional networking. If law schools structured significant portions of the learning environment so that men and women interacted in task-oriented, interdependent projects, this could create conditions that would reduce bias and promote successful collaboration.<sup>113</sup>

There is some evidence that is consistent with the theory that a paradigm shift in the model of lawyers' roles could enhance women's participation as lawyers. Women appear to be succeeding at a greater rate in the role of in-house counsel than as partners in private practice.<sup>114</sup> Lawyers who are in-house counsel are positioned to have a profound impact on opportunities for women and corporate culture in general.<sup>115</sup> They determine who is promoted and how within the legal department, and who is hired as outside counsel.<sup>116</sup> They are also in a position to influence how women are perceived as managers within a company.

Thus, the project of rethinking the paradigm of law has significant potential as a site for linking the conversations about women and the legal profession in progressive and transformative ways. It also implicates the inadequacy of current models of legal education to help current and future lawyers engage in this process of professional redefinition.

## VI. RETHINKING THE ACADEMY

Legal education can and should foster the transition from gladiator to problem-solver. The current law school model is anachronistic. It fails to equip students with the tools needed to function effectively in a changing and uncertain world. Law schools have a strong incentive and moral imperative to maintain their leadership role in helping equip entrants to the profession to adapt to new challenges and to help the legal profession reclaim its moral status as a profession. Law schools have yet to take adequate account of the move toward team-oriented, context-driven, interdisciplinary practice that has begun to take root in corporations and non-profit institutions. They also have yet to redefine

---

113. See Aronson & Bridgeman, *supra* note 112, at 441; Gaertner et al., *supra* note 112, at 226.

114. Interestingly, women appear to be rising more quickly, and higher, in the corporate counsel setting than in the law firm setting. In 1995, 528 female general counsels were members of the American Corporate Counsel Association, an increase of nearly 20% in just one year. See UNFINISHED BUSINESS, *supra* note 1, at 13. In addition, a 1994 survey of corporate law departments revealed that women were employed in 55% of the junior attorney positions. See *id.*

115. See Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 761 (1993) (discussing how the role of women as general counsel has diversified the legal profession).

116. See *id.*



their culture and mission in ways that include and fully take advantage of the diverse group of students that now occupy law school classes.

What would a law school look like that was designed around the model of lawyer as problem-solver and that could develop this model with a diverse and inclusive group of law students, faculty, and professionals in mind? There are no easy or universal answers to this question. What is needed is a commitment to the vision and the process of striving toward that vision. Law schools must first be willing to examine their own assumptions about the adequacy of the prevailing approach to legal education. They also must find ways of integrating faculties' commitment to research with their responsibility to educate students. Others have articulated proposals and undertaken innovative projects that move in this direction.<sup>117</sup> The impetus for change will come from networks of institutions willing to engage in experimentation, not only at the margins, but also at the center of the educational process.

These initiatives do not necessarily require or even advise abandoning the adversarial model of teaching. Indeed, it is unlikely that the legal profession is on the brink of abandoning its commitment to adversarialism in some dimension. Rather, it is important to offer a range of roles and learning environments to reflect the richness and diversity of the profession. The current one-size-fits-all approach to legal education is not sufficient. Simply adding on at the margins will not create a genuine space for experimentation and change. If the context in which these experiments operate remains static, new initiatives are likely to be marginalized or short-lived.

One approach to creating legitimacy around innovation would be to encourage greater collaboration among faculty who share common concerns or goals in teaching, or who have identified ways that their teaching or research would be enhanced by more conscious interchange among faculty working in the same area. Law schools also could find ways of equipping students to plan their law school educational experience.

The capacity to understand and work with multiple disciplines is becoming an important aspect of effective lawyering. The framework of rethinking the role of lawyers in the twenty-first century workplace offers a basis for pursuing interdisciplinary learning. Lawyers increasingly participate in interdisciplinary teams oriented around providing comprehensive and adaptive responses to complex problems. Law students and lawyers must learn how to understand the context in which they are operating and to assess the possible consequences of different strategic choices. They will face the challenge of identifying the types of expertise needed to address a particular problem and integrating these experts into an effective problem-solving team. Law schools that operate within a uni-

---

117. See Frances Ansley, *Starting with the Students: Lessons from Popular Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 7, 17-26 (1994); Barbara L. Bezdek, "Legal Theory and Practice" Development at the University of Maryland: One Teacher's Experience in Programmatic Context, 42 WASH U. J. URB. & CONTEMP. L. 127, 127 (1992); Alice K. Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 N.Y.U. REV. L. & SOC. CHANGE 101, 106 (1991-92); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199, 200 (1993); Guinier et al., *supra* note 1, at 92-98; Rhode, *supra* note 29, at 1563-66; Sarat, *supra* note 7, at 43; Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine and Practice to Life*, 91 MICH. L. REV. 1977, 1978 (1993).

versity could explore ways of collaborating across disciplinary boundaries. For example, law schools could productively work with other professional schools and disciplines in a project of redefining the meaning of expertise and professionalism.

Law schools should embrace more fully a role as facilitators of professional self-reflection and problem-solving. The educational process could engage students and the profession in guided self-teaching and learning as an integral, although not exclusive, aspect of legal education. Law students with identified interests and a research plan could function more in a graduate student mode of field study, research, and supervised writing. Students could be encouraged to become critical observers, indeed scholars, of the field they intend to enter, through either field work or research. Collaborative work among law students and with students in other disciplines could play an important role in this work. Professors could model pedagogy and research that links scholarship and practice in ways that would bridge the gap between theory and practice, and between the academy and the profession.

Various suggestions have surfaced in conversations with colleagues about these ideas, such as a series of courses on the role of the lawyer, developing clustered programs oriented around exploring law and lawyering in particular contexts, such as the workplace, the family, or schools.<sup>118</sup> Faculty also could combine a traditional class with a hands-on experience, either in practice or as field study. This strategy also could help break down the irrational and counter productive divide between clinical and academic track faculty that permeates many law schools.

Over the last five years, I have had the opportunity to participate in one such learning experiment. I have co-taught a seminar with Lani Guinier, a colleague at the University of Pennsylvania, entitled *Critical Perspectives on the Law: Race and Gender*.<sup>119</sup> This class uses a variety of approaches to create a dynamic framework for open, engaged, and constructive dialogue about race and gender and their relationship to law and legal institutions. It was designed not only to explore substantive issues but also to provide students with a structured opportunity to practice communicating across difference and to collaborate toward consensus approaches to problem-solving around issues of race and gender. Participants in the class wrote weekly reflection pieces on the material assigned, often in response to a question or problem posed by student facilitators

---

118. I am in the process of developing a course called *Law and Lawyering in the Workplace*, with Alan Lerner, a clinical faculty member at the University of Pennsylvania. We have developed a description and a set of problems arising in two particular work contexts: law firms and police departments. Students will address both the role of lawyers and the substantive law of the workplace in context. Students will address a series of problems from the perspective of various stakeholders in the process: in-house counsel, managers, human resource personnel, unions, aggrieved individuals, advocacy groups, plaintiffs' counsel, etc. The hope is that they will begin to understand the range of roles that lawyers perform, the organizational and political dynamics that surround the lawyers' role, and the relationship between substantive law and professional role.

119. See Lani Guinier & Susan Sturm, *Race, Gender, and the Dialogue of Democracy: A Tentative Process Theory* (June 8, 1995) (unpublished manuscript building on the seminar to develop a process theory for multiracial deliberative communities) (on file with the *Duke Journal of Gender Law & Policy*).

of that particular session. The class is explicitly designed to equip students to work collaboratively in diverse groups.

Expanding modes of teaching and pedagogy also expands faculty members' knowledge base for evaluating. Students who participated in the Critical Perspectives seminar had a diverse set of interactions with faculty, which made it much easier to comment on students' range of abilities. As a result, the letters of recommendation for those in the Critical Perspectives class provided a richer, more complete picture based on a semester-long opportunity to observe the students in interactive, facilitative leadership roles.

Moving to include a problem-solving orientation also may entail experimentation with models of selection and evaluation that are more likely to locate people with diverse skills and backgrounds that can meet the demands of the twenty-first century workplace. As the applicant pool shrinks,<sup>120</sup> law schools will need better ways of selecting candidates who are able to perform well. The prevailing methods of selecting students have inadequate predictive value, even for performance in law school, and have no track record in predicting successful performance in practice, however that can be measured.<sup>121</sup>

The current challenge to conventional ways of diversifying law school student bodies and faculties adds particular urgency to the task of rethinking what law schools are looking for and who they select to attend. Affirmative action programs that have been crucial in diversifying student bodies are in jeopardy.<sup>122</sup> Unless law schools face up to the challenge of rethinking their approaches to selection, they face the prospect of becoming even more exclusionary, homogeneous, and unresponsive to the demands of democracy and community. The first step in moving to a problem-solving orientation is to engage in a conversation about the goals of legal education. This step is crucial because the legitimacy of selection criteria can be assessed only in relation to the goals schools strive to achieve. If taken seriously, the project of rethinking admission criteria could help law schools revitalize their conception of professionalism. It also could help create the kind of diverse, multi-dimensional community that lawyers must be able to negotiate when they graduate. Law schools could experiment with giving greater weight to experience in other settings prior to coming to law school, a practice already employed by business schools. Students may be more equipped to learn a problem-solving role if they have a context from work experience that gives them a base from which to understand and critique assumptions underly-

---

120. See Patricia G. Barnes, *Cutting Classes: Many Law Schools Are Shrinking Along with the Job Market*, 81 A.B.A. J. 26, 26 (Dec. 1995) (reporting that 76 of the ABA's 177 accredited law schools had smaller incoming classes in 1994 compared to 1993, and that the number of applicants to law school nationwide has dropped from a high of 94,000 in 1991 to 78,000 in 1995).

121. See Guinier et al., *supra* note 1, at 23 n.70, 27 n.74 (showing weak correlations between LSAT scores and law school grades in a study at the University of Pennsylvania Law School).

122. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996), *cert. denied*, 135 S. Ct. 2580 (holding that a law school may not use diversity as a justification for taking race into account in law school admission); *Podbersky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995) (striking down the scholarships that are available exclusively to members of one race); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989) (holding that a race based remedial measure must be supported by strong evidence that the remedial action is necessary and is narrowly tailored to meet the remedial goal).

ing legal methodologies. A move to weigh certain kinds of experience more heavily in the selection process also may have the effect of bringing more diversity in gender, race, and class to the law school student body.

Many law schools, including the University of Pennsylvania, are engaged in a process of institutional self-reflection. This is a moment in which concerns about including women and people of color as full participants in the legal profession can be linked with reclaiming a moral and functional vision of that profession. To achieve this, women, people of color, and other key stakeholders must be full participants in the conversation about where legal education and the legal profession should be going and how to get there. This means encouraging law schools to create ongoing conversations that permit diverse perspectives to be heard and influence the direction of institutional decisionmaking.

## VII. CONCLUSION: FORGING AHEAD

The project of developing progressive models of lawyering that meet the challenges of a changing economy permits an opportunity to build bridges across the conversations about women, the academy, and the legal profession. However, it is important to acknowledge the risks associated with this attempt to straddle the margins and the center. First, how can institutions structure processes and incentives to address the concern for inclusion and the concern for legal revitalization? How do we get those who do not look at the world from the perspective of the margins to embrace the role of women and people of color as the miners' canary? This is both a political and an organizational challenge. It may entail examining the composition of decisionmaking bodies to ensure adequate, not token, participation. It also may necessitate regular consultation by those with overall authority for policy with groups particularly concerned with issues of diversity and inclusion. Finally, it likely will require the building of strategic alliances among groups with different but overlapping agendas.

A second more fundamental question involves the possibility that the concerns of women and people of color will be marginalized if they become part of the broader agenda. As Derrick Bell so eloquently has demonstrated,<sup>123</sup> when people of color merge their interests with those of the dominant group, their interests frequently become submerged, redefined, and subordinated. Linking conversations could be a way of getting gender off the table. I am not suggesting that attention to gender issues per se should stop. It is crucial to keep documenting the experience and critique of those who are underrepresented and marginalized in the current culture. This documentation is needed to preserve the capacity to advocate on behalf of those who continue to be excluded and to maintain the capacity for those experiences to serve as a critical lens on the whole. The challenge is to maintain both, to meet in the common space but preserve the voice, concerns, and distinctiveness of those with different perspectives and experiences.

---

123. See, e.g., DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM passim* (1992) (arguing that interests of minority groups are usually reinterpreted to serve the interests of the majority); Derrick A. Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (discussing how the outcome in *Brown* illustrates a divergence of racial interests).

It is a time to link what is right with what makes good business sense, to explore the potential for innovation in the intersections of separate conversations. This framework can get those concerned about the direction of legal education to the same table, or at least in the same room. The move from gladiators to problem-solvers offers one way to advance the interests of the margins and the center to the benefit of both women and the legal profession.